

STATE OF MICHIGAN
COURT OF APPEALS

In re PETER SOLOMON MARITAL TRUST.

BANK ONE TRUST CO., Trustee of the PETER
SOLOMON MARITAL TRUST,

UNPUBLISHED
August 12, 2003

Petitioner-Appellee,

v

ESTATE OF DOROTHY A. SOLOMON, and
CHARITABLE TRUST SECTION,

No. 239232
Oakland Probate Court
LC No. 98-263194-TI

Respondents-Appellees,

and

PETER AND DOROTHY SOLOMON
FOUNDATION,

Respondent-Appellant.

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Respondent, the Peter and Dorothy Solomon Foundation (the Foundation), appeals as of right the probate court's order discharging petitioner, Bank One Trust Co., as trustee of the Peter Solomon Marital Trust (Marital Trust) and terminating the Marital Trust. We reverse and remand.

On appeal, the Foundation, the residual beneficiary of the Marital Trust, asserts that the probate court erred in entering an order approving and allowing payment of the trustee fees and legal fees against the Marital Trust over the objection of the Foundation and with no inquiry into the reasonableness of the fees, in discharging petitioner as trustee and in terminating the Marital Trust. We agree.

A decision by the probate court regarding the allowance of attorney and trustee fees will not be overturned on appeal absent an abuse of discretion. *In re Eddy Estate*, 354 Mich 334, 347-348; 92 NW2d 458 (1958); *In re Krueger*, 176 Mich App 241, 248; 438 NW2d 898 (1989). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the

trial court acted, would say there is no justification or excuse for the ruling. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997), overruled in part on other grounds *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 556; 640 NW2d 256 (2002).

MCL 700.7205 provides that, on petition of an interested person, after notice to all interested persons, the probate court may review the propriety of the employment of an attorney by a trustee and may review the reasonableness of compensation of a person so employed and the reasonableness of the compensation determined by the trustee for the trustee's own services. While there is no precise formula for assessing the reasonableness of an attorney fee, certain factors should be considered, including: (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitation imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999); *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 340-342; 530 NW2d 183 (1995). The burden of proof of reasonableness of the fees rests on the person claiming compensation. *In re Eddy*, *supra* at 348; *In re Krueger*, *supra* at 249, 251. If the reasonableness of a fee request is challenged, the court must normally conduct an evidentiary hearing. *Head*, *supra* at 113.

In this case, the trial court made no inquiry into the factors for determining the reasonableness of the attorney fees challenged by the Foundation. *In re Condemnation of Private Property*, *supra*; *In re Krueger*, *supra* at 250-251. Nor did the trial court cite any reason for the failure to hold such an inquiry other than that completing the settlement and concluding the case was in the parties' best interests. The trial court abused its discretion in accepting as "prima facie accurate" the statement by petitioner regarding the trustee and legal fees charged against the Marital Trust and in entering the order approving payment of the fees. *Pettermann v Haverhill Farms, Inc*, 125 Mich App 30, 32-33; 335 NW2d 710 (1983).

Petitioner argues that the order of January 7, 2002, which approved and allowed the trustee and legal fees, is a stipulation by all of the parties, and therefore, the Foundation cannot allege error in the trial court's entry of the order. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). However, a review of the January 7, 2002, order shows that counsel for the Foundation signed the order as "Approved as to Form Only." An approval of an order as to form only indicates that the language of the proposed judgment or order comports with the decision actually rendered by the court. It does not imply that the party necessarily agrees with the court's decision. 2 Dean and Longhofer, Michigan Court Rules Practice, § 2602.4, p 299. By signing as "approved as to form only," the Foundation did not stipulate to the approval and allowance of the fees and is not constrained from contesting this issue on appeal.

Petitioner also argues that the issue of trustee and legal fees was not properly before the court as the issue was not pleaded in the petition for instructions and the Foundation never filed any pleadings raising the issue. It is true that the issue was not pleaded in the petition for instructions and the Foundation never filed any pleadings raising the issue. However, the

Foundation's letter of November 15, 2001, to the court expressing concern about the trustee and legal fees did put all parties on notice that the Foundation was pursuing the issue of the reasonableness of all fees. No party objected at the November 16, 2001, hearing to the inclusion of this matter in the current proceedings. All parties, including petitioner, voiced the desire to come to an agreement on all the issues concerning the Marital Trust and to embody that agreement in a final order. Petitioner's stated intention to pursue the issue of trustee and legal fees charged against the Marital Trust resulted in petitioner's waiver of whether the issue was properly before the court. *Chapdelaine, supra* at 177; *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997).

Reversed and remanded for an evidentiary hearing on the reasonableness of trustee and legal fees charged against the Marital Trust. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly